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UNITED NATIONS



NATIONS UNIES

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ICTR
CRIMINAL REGISTRY
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TRIAL CHAMBER II

OR: ENG

Before: Judge William Sekule, Presiding
Judge Yakov Ostrovsky
Judge Tafazzal H. Khan

Registry: Mr. John Kiyeyeu

THE PROSECUTOR
Versus
CLEMENT KAYISHEMA
and
OBED RUZINDANA
Case No. ICTR-95-1-T

**DECISION ON THE DEFENCE MOTION FOR THE RE-EXAMINATION
OF DEFENCE WITNESS DE**

The Office of the Prosecutor:

Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

The Counsel for the Accused:

Mr. Philippe Moriceau (Counsel for Clement Kayishema)
Mr. Pascal Besnier (Counsel for Obed Ruzindana)

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (“The Tribunal”),

SITTING AS Trial Chamber II (“the Trial Chamber”) of the International Criminal Tribunal for Rwanda (“the Tribunal”), composed of Judge William H. Sekule, Presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan;

CONSIDERING that in the instant case, the initial appearance of the accused persons Clement Kayishema and Obed Ruzindana, took place on 31 May 1996 and 29 October 1996 respectively; and hearing on merits commenced on 11 April 1997;

NOTING THAT the Prosecutor closed her case on 13 March 1998;

CONSIDERING THAT the Tribunal is currently hearing the evidence for the Defence;

BEING SEIZED of the motion filed on 24 June 1998, by the accused Clement Kayishema, to re-examine witness DE who had testified previously on behalf of the accused Obed Ruzindana on 21 May 1998;

BEING SEIZED ALSO of the Prosecutor’s reply of 24 June 1998 in which she opposed the abovementioned defence motion for reasons stated below;

MINDFUL OF the imperative need to adhere to the provisions of the Statute of the Tribunal (“the Statute”) and the Rules of Procedure and Evidence (“the Rules”) made thereunder;

HAVING HEARD the parties on 25 June 1998 when the decision to dismiss the motion was pronounced with the observation that reasons in writing would follow;

THE RATIONALE FOR THE DECISION

I. PLEADINGS BY THE PARTIES

A. Counsel for Clement Kayishema:

1. Requested the Trial Chamber to note that the case files of the accused persons Clement Kayishema and Obed Ruzindana were joined pursuant to rules 48, 49 and 50 of the Rules (joinder of the accused, joinder of crimes and amendment of indictments, respectively). Thus, Mr. Kayishema’s Defence Counsel stated, persons jointly accused should be accorded the same rights and opportunities in calling witnesses to the stand. Counsel also argued that the Rules are silent with regard to the re-examination of witnesses in joint trials and needed clarification.

2. Additionally, the Defence Counsel submitted that witness DE was called to testify on behalf of Mr. Ruzindana, but the Prosecutor, during cross-examination, had questioned the witness, raising issues which directly pertained to the case against Mr. Kayishema. This fact, he contended, combined with the Trial Chamber’s refusal to permit Defence Counsel to re-examine the said witness, led to the instant motion.

3. The Defence Counsel for Clement Kayishema then proceeded to cite rule 85 of the Rules which provides that

(A) Each party is entitled to call witnesses and present evidence. Unless otherwise directed by the Trial Chamber, in the interest of justice, evidence at the trial shall be presented in the following sequence:

- (i) evidence for the prosecution;
- (ii) evidence for the defence;
- (iii) prosecution evidence in rebuttal;
- (iv) defence evidence in rejoinder;
- (v) evidence ordered by the Trial Chamber pursuant to rule 98.

(B) Examination in chief, cross examination and re-examination shall be allowed in each case. It shall be for the party calling the witness to examine him in chief, but a judge may at any stage put any question to the witness.

4. The Counsel for Mr. Kayishema further submitted that this rule did not prohibit the re-examination of a witness who may have testified previously. Therefore, it was contended that witness DE should be recalled to the witness stand for the purposes of re-examination.

B. The Prosecutor's Response:

5. The Prosecutor submitted first that, the Defence submissions pertaining to the joinder provisions in the Rules were not applicable to the present motion, as the issue before the Trial Chamber was the clarification of the procedure under which evidence should be presented. Moreover, the Prosecutor reminded the Trial Chamber that pursuant to rule 85 of the Rules, at the commencement of the defense case, the Trial Chamber had delineated a clear procedure for the orderly presentation of defense evidence. Therefore, it was argued that, the rules had been made clear to the parties from the onset of the instant Defence case, rendering this argument moot.

6. Next, the Prosecutor conceded that, in principle, the Trial Chamber retained the discretion to allow a witness to be recalled by the parties. However, she contended that, this should be done only if the Trial Chamber makes a determination that good cause exists for recalling a particular witness.

7. Finally, The Prosecutor remarked that after a review of the record, no testimony was found in the cross-examination of witness DE which address the case against Mr. Kayishema specifically, or which were outside the scope of the examination in chief. All questions posed during cross-examination related generally to massacres throughout Kibyue and Rwanda.

II. DELIBERATIONS

8. As a preliminary matter, the Trial Chamber notes that rule 85 of the Rules is sufficiently clear with regard to the procedure for the presentation of evidence. Additionally, the Trial Chamber reminds the Defence Counsel that, in fact, we had provided the parties with further instructions, on the matter of procedure, at the commencement of the Defence case. The Trial Chamber had informed the parties that if a witness was called to testify on behalf of one of the jointly accused persons, only the party who had called that witness would be permitted to engage in re-examination of that witness.

9. If from the onset, it was indicated that the witness would testify on behalf of both accused persons, only then would the right of re-examination by Counsel for the second accused person arise. It is the opinion of the Trial Chamber that it is apparent that the parties must be afforded equal rights in the presentation of evidence, and at this juncture that issue has been addressed fully. Therefore, the Trial Chamber deems it unnecessary to elaborate further on these issues.

10. With regard to the testimony of witness DE, it is accurate to say that he was called to testify on behalf of Mr. Ruzindana and that the Counsel for Mr. Kayishema was given an opportunity also to put questions to the witness, at which time, witness DE unequivocally stated that he did not know Mr. Kayishema. During cross-examination the Prosecutor questioned the witness, in general terms, about the situation in Kibuye Prefecture and Rwanda in 1994.

11. Therefore, from the submissions of the parties, it stands out that the issues, on which this motion rests, are 1) whether the Prosecutor's particular line of questioning was unduly prejudicial to the case against Mr. Kayishema and 2) whether, the Defence may request the Trial Chamber to recall the witness for the purpose of re-examination.

On the Prejudicial Line of Questioning

12. The Defence written motion reads "Ms. Thornton, the representative of the Prosecutor, led the cross-examination by asking a certain number of questions which concerned Kayishema *specifically . . .*" (Defence motion at p. 1, emphasis added.) This claim was left unsubstantiated, as the Trial Chamber was not provided with any particulars from the cross-examination. Therefore, at the hearing of the motion, when Counsel for Mr. Kayishema was asked to clarify his submission, he was able to state only that the massacre at the Kibuye stadium ("the Stadium") was touched upon during cross-examination and that in the case at bar, Mr. Kayishema alone was charged with having committed crimes at that site.

13. The Trial Chamber finds the Defence Counsel's response unsatisfactory. The Prosecutor's general line of questioning and the witness' responses were simply not prejudicial. After examining the record, it is clear to the Trial Chamber that Witness DE did not attribute the crimes allegedly committed at the Stadium to Mr. Kayishema nor did he implicate the accused in any other way. Accordingly, the Trial Chamber finds that the case of Mr. Kayishema did not suffer prejudice by the Prosecutor's line of questioning.

On the Possibility of the Recalling Witness DE

14. To justify a request for recalling a witness, a party must show good cause. The term "good cause" is generally defined as a substantial reason amounting in law to a legal excuse for failing to perform a required act. BLACK'S LAW DICTIONARY 692 (6th ed. 1990). Applied to the instant motion, this would suggest that the Defence carries the burden of proving that because the Prosecutor did not refrain from an unduly prejudicial line of questioning, the Defence for Mr. Kayishema should be entitled to further question witness DE. As per our findings in the above section, the Defence has not provided the Trial Chamber with information to that effect, either at the hearing or in its written motion. Had the accused brought forth such information, i.e., show good cause, then allowing the witness to be recalled would be within the discretion of this Trial Chamber.

15. In addition, the Trial Chamber is of the considered opinion that in a joint trial, where a

witness is called by one of the accused, other accused persons also have the option to question the witness during the examination in chief. If in the course of cross-examination some ostensibly prejudicial evidence, about a co-accused, is brought to light and is admitted by the Trial Chamber, the co-accused who may have been implicated will have the right to request the Chamber to engage in further questioning of that particular witness in order to clarify the matter. This is not to be considered re-examination *per se*. However, because the Trial Chamber is cognizant of the possibility that such situations may arise during cross-examination, we prefer to retain a degree of flexibility in the interest of conducting the proceedings in a just manner .

FOR ALL THE ABOVE REASONS:-

This Trial Chamber **DISMISSED** the Defence motion.

Signed at Arusha, 19 August 1998



William H. Sekule
Presiding Judge



Yakov A. Ostrovsky
Judge



Tafazzal H. Khan
Judge

SEAL OF THE TRIBUNAL

